

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAMIEN PHILLIPS,

Petitioner,

v.

NEVADA DEPARTMENT OF
CORRECTIONS,

Respondents.

Case No. 2:23-cv-00599-ART-BNW

ORDER

Petitioner Damien Phillips, a *pro se* Nevada prisoner, commenced this habeas action by filing a Petition for Writ of Habeas Corpus (ECF No. 2-3). This habeas matter is before the Court for initial review under the Rules Governing Section 2254 Cases,¹ as well as consideration of Phillips's Motion for Appointment of Counsel (ECF No. 2-1).

Pursuant to Habeas Rule 4, the assigned judge must examine the habeas petition and order a response unless it "plainly appears" that the petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to screen and dismiss petitions that are patently frivolous, vague, conclusory, palpably incredible, false, or plagued by procedural defects. *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998); *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases).

Phillips challenges a conviction and sentence imposed by the Eighth Judicial District Court for Clark County ("state court"). *State of Nevada v. Damien Phillips*, Case No. C-18-335500-1.² On May 6, 2020, the state court entered an

¹ All references to a "Habeas Rule" or the "Habeas Rules" in this order identify the Rules Governing Section 2254 Cases in the United States District Courts.

² The Court takes judicial notice of the online docket records of the Eighth

1 amended judgment of conviction for conspiracy to commit burglary, conspiracy
2 to commit robbery, six counts of burglary while in possession of a deadly weapon,
3 nine counts of robbery with use of a deadly weapon, three counts of assault with
4 a deadly weapon, and one count of assault with a deadly weapon, victim 60 years
5 of age or older. The state court sentenced Phillips to an aggregate term of 24 to
6 80 years. The Nevada Supreme Court affirmed the conviction.

7 Phillips filed a state petition for writ of habeas corpus. *Damien Phillips v.*
8 *State of Nevada*, Case No. A-21-831976-W. The state court denied his habeas
9 petition and he did not appeal the denial of that petition. On October 13, 2021,
10 Phillips filed another state petition, and the state court denied his second state
11 habeas petition. The Nevada Court of Appeals affirmed the denial of relief finding
12 his petition untimely and successive.

13 On April 19, 2023, Phillips filed his federal petition for writ of habeas
14 corpus. (ECF No. 2-3.) The Court considered Phillip's IFP application along with
15 the attached financial documents and conclude that he cannot pay the \$5.00
16 filing fee. The IFP application (ECF Nos. 2, 4) will therefore be granted.

17 Turning to Phillips's motion for appointment of counsel (ECF No. 2-1) to
18 assist him in this habeas action, there is no constitutional right to appointed
19 counsel in a federal habeas corpus proceeding. *See Luna v. Kernan*, 784 F.3d
20 640, 642 (9th Cir. 2015) (citing *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007)).
21 However, an indigent petitioner may request appointed counsel to pursue that
22 relief. *See* 18 U.S.C. § 3006A(a)(2)(B). The decision to appoint counsel is generally
23 discretionary. *Id.* (authorizing appointment of counsel "when the interests of
24 justice so require"). But counsel must be appointed if the complexities of the case
25 are such that denial of counsel would amount to a denial of due process, and

26 _____
27 Judicial District Court and Nevada appellate courts. The docket records may be
28 accessed by the public online at:
<https://www.clarkcountycourts.us/Anonymous/default.aspx> and
at: <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 where the petitioner is so uneducated that he or she is incapable of fairly
 2 presenting his or her claims. *See La Mere v. Risley*, 827 F.2d 622, 626 (9th Cir.
 3 1987); *Brown v. United States*, 623 F.2d 54, 61 (9th Cir. 1980).

4 The Court finds that appointment of counsel in this case is in the interests
 5 of justice. Phillips is serving a lengthy aggregate sentence term of 24 to 80 years.
 6 His petition may raise relatively complex issues, including equitable and/or
 7 statutory tolling and/or claims of actual innocence. It is unclear whether he will
 8 be able to adequately articulate his claims in proper person with the resources
 9 available to him. Therefore, Phillips's motion for appointment of counsel is
 10 granted.


11 **IT THEREFORE IS ORDERED:**

- 12 1. Petitioner Damien Phillips's Motion for Appointment of Counsel (ECF
 13 No. 2-1) is granted.
- 14 2. Petitioner Damien Phillips's Application for Leave to Proceed *in forma*
 15 *pauperis* (ECF Nos. 2, 4) is granted.
- 16 3. The Federal Public Defender is provisionally appointed as counsel and
 17 will have 30 days to undertake direct representation of Phillips or to
 18 indicate the office's inability to represent Phillips in these proceedings.
 19 If the Federal Public Defender is unable to represent Phillips, the Court
 20 will appoint alternate counsel. The counsel appointed will represent
 21 Phillips in all federal proceedings related to this matter, including any
 22 appeals or certiorari proceedings, unless allowed to withdraw. A
 23 deadline for the filing of an amended petition and/or seeking other relief
 24 will be set after counsel has entered an appearance. The Court
 25 anticipates a deadline of approximately 60 days from entry of the formal
 26 order of appointment.
- 27 4. Any deadline established and/or any extension thereof will not signify
 28 any implied finding of a basis for tolling during the time period

1 established. Phillips at all times remains responsible for calculating the
2 running of the federal limitation period and timely presenting claims.
3 That is, by setting a deadline to amend the petition and/or by granting
4 any extension thereof, the Court makes no finding or representation
5 that the petition, any amendments thereto, and/or any claims
6 contained therein are not subject to dismissal as untimely. *See Sossa v.*
7 *Diaz*, 729 F.3d 1225, 1235 (9th Cir. 2013).

- 8 5. The Clerk of the Court will file Petitioner Damien Phillips's Petition for
9 Writ of Habeas Corpus (ECF No. 2-3).
- 10 6. The Clerk of Court is directed to add Nevada Attorney General Aaron D.
11 Ford as counsel for Respondents and to provide Respondents an
12 electronic copy of all items previously filed in this case by regenerating
13 the Notice of Electronic Filing to the office of the AG only. Respondents'
14 counsel must enter a notice of appearance within 21 days of entry of
15 this order, but no further response will be required from Respondents
16 until further order of the Court.
- 17 7. The Clerk of Court is further directed to send a copy of this order to the
18 *pro se* Petitioner, the Nevada Attorney General, the Federal Public
19 Defender, and the CJA Coordinator for this division.

20
21 DATED THIS 13th day of June 2023.

22
23 
24 ANNE R. TRAUM
25 UNITED STATES DISTRICT JUDGE
26
27
28